UTUSAN MELAYU (MALAYSIA) BHD (DALAM PENGGULUNGAN SUKARELA PEMIUTANG) v. MENTERI SUMBER MANUSIA & ORS AND OTHER APPLICATIONS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NOS: WA-25-322-10-2020, WA-25-324-11-2020 & WA-25-330-11-2020]
27 OCTOBER 2022

Abstract – *No action or proceeding shall be proceeded with or commenced against a company, which had been placed under creditors voluntary liquidation, without leave from court.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for – Challenge against decision of Minister of Human Resources ('Minister') – Liquidated company ceased operation, leading to termination of employees – Former employees of company lodged representation to Director-General of Industrial Relations – Representation referred to Minister – Minister referred matter to Industrial Court – Whether leave of winding-up court required before former employees could commence action against company at Industrial Court*

Following its liquidation, the applicant ceased its operation which, in turn, led to the termination of all the applicant's employees, including the respondents. This prompted the respondents, along with 347 other former employees, to lodge a representation to the Director-General of Industrial Relations ('DGIR'). The DGIR referred the matter to the Minister of Human Resources ('Minister') and the Minister then referred the same to the Industrial Court ('decision'). Hence, the present applications for judicial review for an order of *certiorari* to quash the Minister's decision. In support of its application, the applicant submitted that, *inter alia*, (i) the Minister had misdirected himself in law and acted without jurisdiction and/or exceeded the powers given to him under the law and had misused his discretion by failing to take into consideration that: (a) the applicant had been placed under creditors voluntary liquidation ('CVL'); (b) pursuant to s. 451(2) of the Companies Act 2016 ('CA'), no action or proceeding shall be proceeded with or commenced against the applicant without leave from the court; and (c) the remedy sought by the respondent could be dealt with in liquidation process; and (ii) all, save for two, of the applicant's employees had filed their proofs of debt with the applicant.

Held (allowing applications):

(1) Since the applicant was placed under CVL, the respondents were required to seek leave in the winding-up court to commence their action against the applicant, as provided under s. 451(2) of the CA. The

Minister was not properly advised by the DGIR pertaining to the procedural remedy against a wound-up company. The notification made to the Minister by the DGIR was wrong, irregular and unreasonable. (paras 16 & 20)

(2) The main reason for the termination of the employment of the respondent was due to the liquidation of the applicant and the cessation of its operation. It was impossible for the applicant to offer any reinstatement to the employees. Therefore, the only remedy that could be sought by the respondents was in monetary nature, which could only be dealt adequately with in liquidation process as the respondents had filed their proofs of debt. The lodgement of proofs of debt indicated that the respondents chose to subject themselves to the winding-up proceedings and the respondents were estopped from continuing with the Industrial Court proceedings. (paras 29-31)

(3) By issuing the said decision, the Minister had misdirected himself in law, exceeded the powers given to him and misused his discretion. The Minister's decision in referring the representation to the Industrial Court amounted to an unreasonable decision that no sensible person would have arrived at given the facts and circumstances in hand. It was clear that the Minister acted illegally, irregularly and in contravention with provisions of the law in making the representation to the Industrial Court. (paras 32, 33 & 36)

Case(s) referred to:

Craven v. Blackpool [1936] 3 All ER 513 ***(refd)***

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 45, 451(2), 456
Industrial Relations Act 1967, s. 20(3)
Rules of Court 2012, O. 53

For the applicant - Rajvinder Singh & Afdhilani Jusoh; M/s Dennis Nik & Wong
For the 1st respondent - Aisyaf Falina Abdullah, Mohd Izhanuddin Alias & Rohaiza Hamzah; SFCs
For other respondents - Tengku Azlina Tengku Ismail; M/s Tengku Azlina, Azlan Shah & Azman

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicant had filed judicial review applications No: WA-25-322-10-2020 (JR 322), No: WA-25-324-11-2020 (JR 324) and No: WA-25-330-11-2020 (JR 330) under O. 53 of the Rules of Court 2012 (ROC) for amongst others, an order of *certiorari* to quash the decision of the Honourable Minister of Human Resources (the Minister) dated 4 August 2020 and 10 August 2020 respectively pursuant to s. 20(3) of the Industrial Relations Act 1967 (Act 177) to refer the dismissal of the ex-applicant's employee (the respondents) to the Industrial Court.

[2] Both JR 324 and JR 330 are fixed to be heard together with this JR 322.

[3] After the hearing, I allowed the applicant's application in JR 322, JR 324 and JR 330.

[4] Dissatisfied with the decision, the respondents in JR 322 and JR 330 filed an appeal. However, the respondent in JR 324 did not file any appeal against the decision. I will now set out the grounds for my decision.

Background Facts

[5] The narration of the background facts of the case is adopted with and/or without modifications from the applicant's affidavit in support, statement and written submissions of both parties and can be summarised as follows:

(i) On 7 October 2019, the board of directors of the applicant declared that the applicant is unable to continue its business by reason of its liabilities and Datuk Tee Guan Pian was appointed as the interim Liquidator for the applicant.

(ii) Subsequently, a members and creditors' meeting was held separately on 6 November 2019 whereas Datuk Tee Guan Pian has been appointed as the Liquidator of the applicant.

(iii) On 19 December 2019, following the applicant's application to court *vide* Originating Summons No: WA-24NCC-678-12-2019, approval was granted to the Liquidator pursuant to s. 456 of the Companies Act 2016 (CA) read together with the Eleventh Schedule to exercise all functions and powers of the Liquidator provided under Part I and II of the Twelfth Schedule of the CA.

(iv) The respondents are the ex-employees of the applicant herein that has lodged a representation to the Director General of Industrial Relations (DG of IR) on their termination from the applicant.

(v) Pursuant to the liquidation of the applicant on 7 October 2019, the applicant has ceased its operation which in turn led to the termination of all the employees of the applicant inclusive of the respondents herein.

(vi) The respondents together with 347 ex-employees of the applicant herein have lodged a representation to the DG of IR.

(vii) The DG of IR upon receipt of the representation called for reconciliation meetings between the respondents and other ex-employees (in a separate meeting) with the Liquidator of the applicant but was unsuccessful. Thereafter, the DG of IR referred the matter to the Minister.

(viii) *Vide* letter dated 4 August 2020, the Minister decided for the representations of the respondents to be referred to the Industrial Court under s. 20(3) of Act 177 (the said decision).

The Applicant's Grounds For The Judicial Review

[6] The applicant's applications herein are based on the following grounds:

(i) The Minister has misdirected himself in law and had acted without jurisdiction and/or exceeded the powers given to him under the law and had misused his discretion by failing to take into consideration the following:

(a) That the applicant herein has been placed, under creditors voluntary liquidation (CVL) on 7 October 2019;

(b) Pursuant to s. 451(2) of the CA/no action or proceeding shall be proceeded with or commenced against the applicant without leave from the court; and

(c) The remedy sought by the respondents herein can be dealt with in liquidation process as the respondents have filed proofs of debt.

[7] By issuing the said decision:

(i) The Minister has acted without any jurisdiction and/or illegality by allowing the representation to be referred to the Industrial Court when the applicant has been placed in liquidation;

(ii) The Minister has acted in excess of jurisdiction and/or illegality by allowing the representation to be referred to the Industrial Court when the applicant has been placed in liquidation without leave of the winding-up court;

(iii) The Minister is wrong when he applied irrelevant consideration to allow representation under s. 20(3) of Act 177 when the applicant has ceased business and is under liquidation;

(iv) In allowing the representation without leave from the court, it will open a floodgate of cases against the applicant herein;

(v) Further, the applicant will be embroiled in time consuming and expensive litigation which, will impact on the returns to the creditors of the applicant;

(vi) All of the employees of the applicant except Encik Ahmad Haziq bin Md Shah and Encik Lukman bin Ismail have filed proofs of debt with the applicant and the employees' claims have been recorded substantially in the statement of affairs prepared by the director of the applicant;

(vii) To-date, the Liquidator has not adjudicated the proofs of debt. This is because the liquidation of the applicant's assets is still on-going;

(viii) The remedy sought by the respondents can only be confined to monetary compensation which the said issue can be dealt with in the winding-up process; and

(ix) Based on the foregoing, the respondents are estopped from proceeding with the proceedings in the Industrial Court.

The Law

[8] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety.

[9] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[10] It is settled law that the High Court will not interfere with a decision of the Minister and/or the Industrial Court unless it can be established that the decision is infected with errors of law.

[11] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 1 MLR A 268; [1995] 2 AMR 1601; [1995] 2 MLJ 317 in the following words:

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law*, for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law*.
>
> (emphasis added)

[12] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the Minister had, among others:

(i) asked itself the wrong questions;

(ii) considered irrelevant matters;

(iii) failed to consider relevant matters;

(iv) failed to apply the proper principle(s) of law; and/or

(v) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

The Decision Of The Court

[13] It is a fact not disputed by all the parties that when the Minister made a decision to refer the representation of the respondents, the Minister was fully aware that the applicant has ceased operation and has been wound-up.

[14] This can be gleaned from the Minister's affidavit in reply (encl. 24) in para. 21 when he admitted as follows:

> 21.1 Saya mengambil maklum Pemohon telah diletakkan di bawah Penggulungan Sukarela Pemiutang pada 7.10.2019.

[15] Section 451 of CA states as follows:

> **451. Property and proceedings**
>
> (1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding-up shall be void.
>
> (2) After the commencement of the winding-up, **no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court** and subject to such terms as the Court may impose.
>
> (emphasis added)

[16] Based on the above, it is my view that since the applicant was placed under CVL on 7 October 2019, the respondents are required to seek leave in the winding-up court to commence their action against the company as provided under s. 451(2) of CA.

[17] Therefore, the respondents ought to seek leave from the winding-up court to institute action and/or proceedings against the applicant.

[18] The guiding principle in deciding whether or not leave ought to be granted to commence legal action against a wound-up company can be found in the then Federal Court case of *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 1 MLRA 558; [1985] 2 MLJ 446 where it was held as follows:

In *Re Cuthbert Lead Smelting Co Ltd*, it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, *the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding-up proceedings*. (emphasis added)

[19] Coming back to the facts in the present case, the Minister has knowledge that the applicant has been wound-up, the Minister knew that the proper remedy for the respondents is vested in the winding-up process procedure as admitted in para. 21.1 of encl. 24:

21.1 Saya mengambil maklum Pemohon telah diletakkan di bawah Penggulungan Sukarela Pemiutang pada 7.10.2019.

[20] I view that the Minister was not properly advised by the DG of IR in pertaining to the procedural remedy against a wound-up company. Therefore, the notification made to the Minister by the DG of IR was wrong, irregular and unreasonable.

[21] It shall be noted that all of the employees of the applicant except Encik Ahmad Haziq bin Mad Shah and Encik Lukman bin Ismail have file proofs of debt with the applicant and the employees' claims have been recorded substantially in the statement of affairs prepared by the director of the applicant and the proofs of debt are now pending adjudication by the Liquidator of the applicant.

[22] Further, I find that the current situation involves a case of termination of employees due to the cessation of operation of the company and the company has been placed under creditors' winding-up and not a conventional "unlawful" dismissal.

[23] The Minister has submitted that there are no provisions under s. 20(3) of Act 177 which prevented any representation made in the situation of a wound-up company.

[24] However, I am of the view that the position of s. 451(2) of the CA shall be read together with s. 20(3) of Act 177 in dealing with the present application especially when the Minister has knowledge that the applicant has been wound-up and proofs of debt have been filed. It is also pertinent in the instant case that the applicant has been placed under the CVL when the representation was referred to the Minister.

[25] Therefore, since the Minister has knowledge that the applicant has been wound-up, the Minister knew that the proper remedy for the respondents is vested in the winding-up process procedure as admitted in para. 21.1 of affidavit in reply (encl. 24).

[26] In light of the above and due to the fact that the applicant has been placed under the CVL, it is my view that the provisions of s. 20(3) of Act 177 ought to be read together with s. 451 of the CA. The general provision of s. 20(3) of Act 177 shall take into consideration of the more specific law that governs a winding-up company *ie*, s. 451 of the CA.

[27] The then Supreme Court in the case of *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; [1990] 2 MLRA 246 held as follows:

> **The minister's discretion under s 20(3) is wide but not unlimited** ...
> (emphasis added)

[28] Based on the above, it is my judgment that the wide discretion as provided under s. 20(3) of Act 177 is not unlimited and shall be limited by other contemporaneous positions of law *ie*, s. 451(2) of the CA.

[29] In the instant case, it is undisputed fact that the main reason for termination of the employment of the respondents was due to the liquidation and the operation of the applicant has been ceased, therefore it is impossible for the applicant to offer any reinstatement to the employees.

[30] As reinstatement is impossible, the remedies left (if any) to the respondents are in terms of monetary form and the only remedy that can be sought by the respondents herein is in monetary nature which can be dealt adequately with in liquidation process as the respondents have filed their proofs of debt as shown in exh. TGP-6, encl. 4 (jilid 2) on pp. 271 to 282.

[31] It is clear that the lodgement of proofs of debt indicates that the respondents choose to subject themselves to the winding-up proceedings and the respondents are thereafter estopped from continuing with the Industrial Court proceedings. (See *Craven v. Blackpool Greyhound Stadium & Resources Ltd* [1936] 3 All ER 513).

[32] In light of the above, it is my view that by issuing the said decision, the Minister has misdirected himself in law and had exceeded the powers given to him under the law and had misused his discretion by failing to take into consideration the above.

[33] I am of the considered opinion that the decision made by the Minister in referring the representation to the Industrial Court does amount to an unreasonable decision that no sensible person would have arrived into that decision given all the facts and circumstances in hand.

[34] It is also my considered view that in allowing the representation without leave from the court, it will open a floodgate of cases against the applicant herein and employees of a wound-up company and will defeat the intention of the Parliament for specific law that governs the company in liquidation *ie*, the CA.

Conclusion

[35] Based on the reasons above, it is my considered view that decision-making process by the Minister is tainted with illegality and/or irrationality and/or procedural impropriety as the wrong law has been applied accordingly.

[36] Based on the foregoing, it is clear that the Minister has acted illegally, irregularly and in contravention with provisions of law in making the representation to the Industrial Court.